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Supreme Court of the United States

OCTOBER TERM, 1966

No. 136

RICHARD H. M. SWANN and SUPERVISOR OF ELECTIONS of Dade County, Florida,

Appellants,

versus

TOM ADAMS, Secretary of State of Florida; E. L. GATES, Supervisor of Registration of Broward County, Florida; and W. B. FREEMAN, Supervisor of Registration of Monroe County, Florida,

Appellees.

On Appeal from the United States District Court, Southern District of Florida.

BRIEF OF APPELLEE, W. B. FREEMAN, SUPERVISOR OF REGISTRATION OF MONROE COUNTY, FLORIDA.

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OPINIONS BELOW.

The opinion and order appealed from, which were entered on March 18, 1966 by the United States District

Court for the Southern District of Florida, are unreported. They appear in the Record at pages 77-79. Earlier opinions in this cause are:

(i) *Sobel v. Adams, 208 F.Supp. 316 (S. D. Fla., 1962);*

(ii) *Sobel v. Adams, 214 F.Supp. 811 (S. D. Fla., 1963);*

(iii) *Swann v. Adams, 378 U.S. 553;*

(iv) *Swann v. Adams, unreported (S. D. Fla., December 23, 1965);*

(v) *Swann v. Adams, 382 U.S. 210.*

This opinion appears in the Record at pages 13-14.

STATEMENT OF THE CASE.

The history of this case is set out in detail in this Court's decision in *Swann v. Adams,* 382 U.S. 210, entered on February 25, 1966.

On February 26, 1966, the Governor of Florida called the Legislature into Special Session, which Special Session convened on March 2, 1966, for the purpose of reapportionment.

On February 28, 1966, the Appellants filed a petition asking the District Court to adopt and put into immediate effect a reapportionment plan which had been prepared by the Appellants, which plan was based on

portions of *Section 2, Article VII of the Florida Constitution* which have been declared void and inoperative. *Jordan v. Green*, 173 So.2d 448.

On March 1, 1966, the District Court deferred any hearing on the Appellants' petition on the ground that the District Court was without jurisdiction until it received the United States Supreme Court's mandate on its opinion dated February 25, 1966 (R. 36).

On March 2, 1966, the Special Session commenced. To aid the Special Session in its deliberations, the Attorney General of the State of Florida prepared and furnished to the Legislature a document styled "Criteria and Guidelines for Reapportionment as Established by the Federal Courts" (R. 89-90). In addition to the paragraph quoted on page 8 of the Appellants' brief, the guidelines provided:

"1. A Majority of the people must be able to elect a majority of the Legislature.

"2. Membership in both houses must be apportioned on a population basis.

"3. Consideration of areas, economic interest or political subdivisions standing alone do not provide valid criteria for apportionment but a combination of these factors may be used so long as population is a major consideration. Under no circumstances may these or any other factors be used except on the basis of a rational or reasonable plan of apportionment.

"4. Neither mathematical exactitude nor a rigid and uniform formula is required, but each plan must be reviewed on its own merits and any deviation from population must be justified.

"5. The 1960 federal census must be the criteria for determining the population of a county.

"6. * * *"

On March 9, 1966, the Legislature enacted HB 17-X(66), Chapter 66-1, Laws of Florida (R. 44-56), which statute was approved by the Governor on March 10, 1966.

On March 14, 1966, the Attorney General of the State of Florida moved the District Court to approve HB 17-X(66) (R. 41-60), and on March 15, 1966, the Appellants filed certain documents attacking the statute and suggesting modifications (R. 64-72).

Oral argument was held on March 15, 1966 (R. 87-106). At this time the Attorney General urged the Court to approve HB 17-X(66) without change. The Appellants sought to have the court adopt a plan they had originally submitted July 6, 1965, calling for 32 senators and 68 representatives, (R. 19-32) or in the alternative, the adoption of the Appellants' "Suggested Modifications to the Plan of Apportionment Contained in HB 17-X(66)" (R. 64-72).

On March 18, 1966, the District Court entered its opinion and order holding HB 17-X(66) constitutional (R. 77-79).

On March 25, 1966, the Appellants herein filed separate notices of appeal directed to the District Court's order of March 18, 1966 (R. 80-86).

On October 10, 1966, this Court entered its order noting probable jurisdiction (R. 107).

SUMMARY OF THE ARGUMENT.

Neither of the Appellants have legal standing to prosecute this appeal. The Appellant Swann did not file this action as a class action but only as a resident and qualified voter of Dade County, Florida, and he now admits that he, as a voter in Dade County, Florida, is no longer invidiously discriminated against.

The Appellant Supervisor of Elections of Dade County, Florida, a party only in his official capacity as Supervisor, holds an administrative office created by the Legislature having only ministerial functions, and therefore, cannot question the constitutional validity of the Florida Reapportionment Act, HB 17-X(66).

The present plan of reapportionment in Florida meets the standard of maximum voter equality enunciated in *Reynolds v. Sims*, 377 U.S. 533, and in enacting this plan the Legislature did not adopt a so-called rule styled by the Appellant as the doctrine of maximum permissible deviation. Moreover, the plans submitted by the Appellants invidiously discriminate against the less populous areas of the state.

ARGUMENT.

I.

The Appellants Do Not Have Standing To Maintain This Appeal.

The Appellee, W. B. Freeman, Supervisor of Registration of Monroe County, Florida, has thoroughly briefed this first point on page 4 to page 15 of his prior brief which was filed herein on or about June 8, 1966, in support of the said Appellee's motion to dismiss or to affirm, and the Appellee hereby adopts the arguments made and the authorities cited in that brief as if fully set out and incorporated in this brief.

The Appellants in their brief on the merits attempt to ignore this question by contenting themselves with an argument that might be summarized by the statement that they have standing because they have standing. The argument attempted by the Appellants on this point is made entirely on behalf of the Appellant Swann. No attempt is made to offer argument in justification of the right of the Appellant Supervisor of Registration of Dade County to prosecute this appeal.

On pages 25 and 26 of their brief on the merits, the Appellants prefaced their argument with several hypothetical factual situations setting out what would be the situation had Dade County been discriminated against in the present plan of reapportionment. Since the facts upon which these hypotheticals are based do not exist,

the conclusions the Appellants draw from them are not material to any issue in this case.

The Appellant Swann contends that he brought this action as a voter in Dade County and as an urban voter of the State of Florida. His complaint shows instead that he brought the action in his capacity as a qualified voter of Dade County, Florida, seeking to have his vote counted equally with those of other voters. Appellant admits that he has achieved this aim under HB 17-X(66). Thus he no longer has any legal standing to complain.

Appellant Swann now also insists that he somehow represents all the urban voters in Florida. Appellee is aware that the Appellant likes to consider his actions in this cause in such a light, but it is extremely doubtful whether Appellant's zeal is so viewed by a majority of those residing outside of Dade County. It is also doubtful whether the Appellant's definition of an urban voter would comport with the definition of that term by many of the voters residing outside of Dade County, Florida.

In support of the argument under this point, the Appellants cite the decision of this Court in *Lucas v. Colorado General Assembly*, 377 U. S. 713 at page 736.

The Appellee believes the Appellants misconstrue the meaning of certain language used in that case. That case held that an individual had a right to cast an equally weighted vote, which right could not be denied by the vote of a majority of the state's electorate.

"* * * An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. * * * . . . 'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. * * *"

(Lucas v. Colorado General Assembly, 377 U.S. 713, 736-737.)

The existence of an individual and constitutionally protected right to seek relief in regard to a malapportioned Legislature does not overcome all other considerations with respect to *standing*, *rightness*, or *mootness* or all other rules governing appellate procedure or the right to appellate review. The Appellee suggests that the present Appellants are in the same position as Appellant Grills in *Stout v. Bottorff*, 246 F.Supp. 825 at page 828, and should be accorded the same treatment.

"Before turning to the principal issue, we decide two subordinate questions. First, plaintiff Grills, a resident of Marion County and a member of the Senate of the Ninety-fourth General Assembly, is without standing in this phase of the proceedings to assert that the 1965 Act is invalid because it dilutes the votes of some residents of the state. He

makes no complaint of debasement of his vote or those of Marion County voters generally, and we see no merit in his claim that as an elected state senator he has standing to assert in this proceeding at this time a right to serve in a constitutionally-apportioned General Assembly."

(Stout v. Bottorff, 246 F.Supp. 825, 828.)

II.

HB 17-X(66) Enacted By The Florida Legislature On March 9, 1966, Complies With The Standard Of Voter Equality Enunciated By The Supreme Court Of The United States In The REAPPORTIONMENT Cases.

The Appellee Freeman adopts the argument and authorities set forth on pages 15 through 28 of his prior brief filed herein on or about June 8, 1966, in support of the said Appellee's motion to dismiss or to affirm, as if fully set out and incorporated in this brief. However, the Appellee would like to supplement that brief with the following additional arguments.

(A) The Appellants claim that the Florida Legislature adopted a maximum permissible deviation rule and then extended its limits from 15% to 18%. This claim is based on the existence in only two representative districts of deviations of 18% (R. 68), despite the fact that deviations between the largest and smallest districts create a ratio 1.30:1 in the senate districts and 1.41:1 in the house districts (R. 41; 78).

The Appellants also argue loudly that they have offered a plan to the Federal District Court which, they say, satisfies all non-population considerations and deviates only 3.35% in one house and 1. 95% in the other. (See Appellants' brief on the merits on page 16.)

The Appellants do not explain what these non-population considerations are or how they have been satisfied, but a review of this plan (R. 19-32) reveals the rankest kind of gerrymandering designed to put what the Appellants describe as urban areas into complete control of the Legislature without giving any considerations to factors other than population.

To demonstrate how completely the Appellants have disregarded relevant factors other than population, the Appellee would first point to the treatment accorded Monroe County, Florida.

In the Senate the Appellants would create District K composed of the counties of Palm Beach, population 228,106, Broward, population 333,946, Collier, population 15,753 and Monroe, population 47,921 (R. 23) and allot this district four senators, each of whom would represent 156,432 persons. In the House, the Appellants would create District M composed of the counties of Hendry, population 8,719, Collier, population 15,753, and Monroe, population 47,921 (R. 30), and allot this district one representative. In both the Senate and the House, the Appellants designate Dade County as a separate district.

The Appellants insist that this plan provides a minimum of deviation from the standpoint of mathematical exactness. Whether this contention is true or not really has no meaning for once consideration is given to factors other than mathematical preciseness, the plan grows ridiculous and the motive of the draftsman becomes all too apparent.

The Appellants may as well join Monroe County with Duval County, which is some 300 miles distant, or with any other county in the state if Monroe is to be joined with Palm Beach, Broward or Collier County. A casual observer just glancing at a map might gain the momentary impression that Monroe is physically linked to Collier. Geographically this is true, but anyone who makes a more careful study of the map, or is as familiar with the area as the Appellants should be, soon discovers that this geographical link means nothing. In fact, the Appellee believes this Court may take judicial notice that the portion of Monroe County joining Collier County is a part of the Everglades National Park and inhabited by alligators and other denizens of the swamps who, like pine trees, do not vote.

When the population spread in the various counties grouped together by the Appellant, as indicated above, is considered it is apparent that the member of the House in District M would probably come from Monroe, and that all of the senators in District K would come either from Palm Beach County or Broward County. In any case, a citizen in Monroe desiring to meet with his senator or a citizen in Hendry County or Collier County

desiring to meet with his representative in these suggested districts would have to drive through Dade County, fly over it, or take a boat around it. There are no regularly established roads or other means of transportation or communication in that portion of Monroe County lying in the Everglades and bordering Collier County on the south.

The inhabited or populated portions of Monroe County, Florida, as the Appellants should know, lie entirely in that narrow chain of keys extending from the southeastern corner of Dade County in a west, southwesterly direction to the City of Key West, and the only road in or out of the keys is U.S. Highway No. 1 through Dade County, Florida.

Geographically and economically or from any other standpoint, the interests of the people of Monroe County should not be divorced or treated separately from those of Dade County, and the Legislature took cognizance of this when it devised HB 17-X(66), the present reapportionment plan, the only plan that can give some representation to Monroe County on a reasonable and rational basis while still complying with the standards set by this Court in *Reynolds v. Sims*, 317 U.S. 533.

HB 17-X(66) creates Senate District 42 composed of all of Monroe County and 18 precincts of Southern Dade County, which immediately join Monroe County on the north, having a total population of 103,025 which gives a deviation of only -.13 underrepresented from exact mathematical equality. It creates a representa-

tive district comprised of Monroe County alone having a total population of 47,921 which gives a deviation of only -.13.2 underrepresented from exact mathematical equality (R. 69, 76). Moreover, the Appellants recognize the fairness of this provision in HB 17-X(66) for in their suggested modifications to this Act, they recommended that these provisions remain unchanged (R. 65, 69).

The Appellants throughout the plan they propose have employed a pattern of discrimination against the less populous counties in Florida in both houses of the Legislature. In each instance, without regard to any factor other than population, the Appellants group a number of the less populous counties to one or more of the more populous counties taking care always in this grouping that the members to be elected to either house will of necessity come from the more populous counties.

The Appellants during this litigation have continually raised their voices in righteous indignation at the supposed injustice done to the urban areas through the alleged control of the Legislature by the less populous areas, but it disturbs them not at all to offer a suggestion that this same degree of control be transferred and placed absolutely in the hands of representatives of the few heavily populated areas of the State.

(B) The Appellants contend that there is a pattern of under representation for certain urban counties and over representation for certain rural counties in both houses of the Legislature.

The Appellee has answered this argument in his prior brief filed herein on or about June 8, 1966, in sup-

port of the Appellee's motion to dismiss or to affirm, and the Appellee hereby adopts the argument and authorities cited in that brief, but the Appellee would like to supplement that brief with a few comments specifically directed at the factors Appellants list on pages 20 through 22 of their brief on the merits, which factors the Appellants contend indicate a pattern of discrimination in HB 17-X(66).

In paragraph (a) on page 20, the Appellant contends that Duval and Palm Beach counties, two of the most heavily populated in the state, are under represented in the Senate, but when the Appellants filed their suggested modification to the plan of apportionment contained in HB 17-X(66) they recommended that the District Court leave the portions of HB 17-X(66) relating to these two counties unchanged (R. 65-66).

In paragraph (c) on page 21 of their brief, the Appellant again notes that Palm Beach County is under represented in the Senate by more than 10% and under represented in the House by more than 7%. Yet again in that suggested modification to HB 17-X(66) the Appellants recommended to the District Court that these portions of the act relating to Palm Beach County remain unchanged (R. 66, 69).

In paragraph (f) on page 22 of their brief, the Appellants note that Manatee County is over represented by 18.3% in the House and 7.2% in the Senate, and that Gulf County is over represented by 14% in the Senate and 8.9% in the House. The suggested modification the Appellants submitted to the District Court would

reduce Manatee's representation from 18.3% to 3.7% in the House (R. 68). However, the Appellants' modification would increase Manatee's over representation in the Senate from 7.2% to 9.8% (R. 66). Gulf County's representation in the Senate would be reduced from 15.4% to 8.7% (R. 64), but there would be no change in the House (R. 67).

Finally, in the last paragraph on page 22 of their brief, the Appellants remark that no single urban county is over represented in both houses. This is simply not so, but the assertion graphically points up the fallacy of accepting the Appellants' terminology at face value. From all the Appellee can gather, density of population is the only factor used by the Appellants to determine what is rural and what is urban. Using these terms in the sense of density it can be shown that Volusia County is an urban county and is over represented in both houses (R. 66, 68). Yet if the Appellants' suggested modification to HB 17-X(66) were adopted Volusia County's over representation would be increased in the Senate still more and left unchanged in the House.

The Appellants place all their emphasis on an assumed distinction to be made between rural and urban areas of the state, based entirely on population figures now almost seven years old, without once trying fully to define these terms. The Appellee could just as logically contend, and does so contend, that Alachua County with a population of 74,074 in 1960 (the home of Gainesville and the University of Florida) and Manatee County with a population of 69,168 in 1960 (the home of the Cities of Bradenton and Palmetto) are

urban counties. Both counties have large urban populations and both are in fast growing areas of the state. On page 21 of their brief, the Appellants list 19 counties they would consider rural in character, which includes Alachua and Manatee. Yet they do not list, for example, Bay and Lee Counties as rural though both of these last mentioned counties have smaller populations than either Alachua or Manatee.

As the District Court noted in one of the prior opinions in the case of *Sobel v. Adams*, 208 F.Supp. 316 at page 324, whether an area is urban or rural often depends upon the point of view. Some areas cannot be classified definitely as urban or rural but have attributes of both. With this statement, the Appellee agrees, and submits that the Appellants are now merly juggling figures with the primary aim of gathering as much legislative power to Dade County as can be accomplished without requiring Dade County to be responsible for or to any of the surrounding counties.

The Appellee submits that the only pattern discernible in HB 17-X(66) is the total absence of a discriminatory pattern. Instead, the reapportionment plan manifests a good faith effort on the part of the Florida Legislature which complies with both the letter and spirit of the case of *Reynolds v. Sims, supra.*

CONCLUSION.

The members of the Legislature who adopted the reapportionment plan here in question were experienced legislators with real knowledge of the state's problems and were citizens who had submitted themselves to

the voters of the state and have been chosen to speak for the voters even though coming from malapportioned districts. On the other hand, the Appellee can see no evidence in the Appellants' efforts or in their background that is indicative of any special legislative ability. Therefore, the Appellee again respectfully submits that the Appellants have no standing to maintain this appeal, that the Appellants have not and cannot show that the present plan of apportionment set forth in HB 17-X(66) fails to meet the standard of voter equality enunciated by this Court in the *Reapportionment* Cases, 377 U.S. 533-765, and the decision of the lower court should be affirmed.

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